EDITOR'S NOTE: vacated by Under Secretary -- memorandum dated Jan. 31, 1989, found at pages 85A and B below.

UNITED STATES
v.
AIKEN BUILDERS PRODUCTS (ON RECONSIDERATION)

IBLA 85-99 Decided April 14, 1988

Petition for Reconsideration of the decision of the Board in United States v. Aiken Builders Products, 95 IBLA 55 (1986).

Decision reaffirmed on reconsideration.

1. Mining Claims: Determination of Validity--Mining Claims: Marketability--Rules of Practice: Appeals: Reconsideration

A petition for reconsideration may be granted only in extraordinary circumstances where good cause is shown therefor. Evidence of the existence of a market for cinders at the time of the withdrawal of such deposits from location in 1955 will not support reconsideration of a decision adjudicating the validity of a mining claim reached after an evidentiary hearing where the existence of such a market was recognized both by the Administrative Law Judge and the Board on review. Where the contest and the appeal were decided on the evidence that cinders from the claims at issue were not marketable, i.e., could not be extracted, removed, and marketed at a profit in 1955, reconsideration is not justified by evidence that there was a market for cinders at the time.

APPEARANCES: William Perry Pendley, Esq., Fairfax, Virginia, for petitioner; William R. Murray, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Board has been requested to reconsider its decision in this case, cited as United States v. Aiken Builders Products, 95 IBLA 55 (1986), in which the Board affirmed on appeal the decision of the Administrative Law Judge, rendered after a mining contest hearing, declaring petitioner's mining claims null and void and rejecting the mineral patent application therefor. Reconsideration was requested by the Director, Office of Hearings and Appeals, on behalf of the Secretary of the Interior, in view of the

points raised in the March 11, 1987, letter of counsel for Aiken Builders Products (hereinafter referred to as Aiken or petitioner) to the Secretary of the Interior with supporting memorandum and appendix.

Petitioner asserts in the letter that the request is based in part "upon the discovery * * * of additional Government documents which, in effect, totally contradicts [sic] the opinion testimony presented by the United States Government at the mineral contest hearing." Petitioner asserts that "had these documents been known by the mineral examiner to exist, no contest would ever have been initiated by the United States Government, and if initiated, no prima facie case could have been established." Petitioner further contends that the result of the decision is inequitable in view of the history of production of cinders from the claims.

In the supporting memorandum accompanying the petition, Aiken raises several issues. Petitioner contends the decision of the Administrative Law Judge and the Board was not based upon accurate information in that the finding of a prima facie case of the lack of marketability of the cinders from the claims and the consequent invalidity of the claims was solely based on the testimony of the expert witness, Joseph Rudys, as to the lack of a market in 1955. Petitioner asserts that since the decision in this case, a 1956 Bureau of Mines bulletin has been discovered describing "good markets [in the West] for increasing sales of pumice for construction uses." Hence, Aiken contends there was a market for cinders in the area in 1955. Petitioner asserts that marketability was acknowledged in a 1982 mineral report for the Cind-R-Lite claims prepared in response to a mineral patent application for those claims, pointing out that Aiken received its supply of cinders for manufacture of blocks from those claims until 1953. Petitioner contends the existence of a market for the cinders from those claims, which were apparently subsequently patented, is relevant to the market for cinders from its claims.

Petitioner further contends that Rudys' conclusion that the market was bad in 1955 was inconsistent with the substance of his testimony. Aiken argues that no prima facie case was established because Rudys' opinion was not based on probative evidence, but rather on conjecture. Further, petitioner asserts that Rudys was not qualified as an expert to give an opinion regarding the market for cinders.

Petitioner concludes that the Bureau of Land Management (BLM) failed to meet its burden of establishing a prima facie case of the lack of market for the cinders in 1955. Aiken contends the testimony of Rudys was not substantiated by any other testimony and that BLM failed to present a single witness who was personally familiar with the market at issue at the time in question.

Petitioner also asserts that any prima facie case that might have been established was overcome. Aiken takes issue with the Board's conclusion that contestee failed to "establish by a preponderance of the evidence that

the cinder on appellant's claims could have been extracted, removed, and marketed at a profit prior to July 23, 1955." 95 IBLA at 59. Aiken argues that the Board has applied the wrong legal standard of marketability and that it is not required to establish that the cinders from its claims could be extracted, removed, and marketed at a profit as of 1955. Petitioner contends that despite the absence of such evidence from the record, it can be concluded from the record that such a market existed in 1955 as would cause a prudent man to invest his time and money with a reasonable prospect of success in developing a valuable mine. Petitioner points out that there is no requirement that actual production take place to sustain a finding of a discovery, but then seeks to argue that there is no requirement that the extraction of the mineral deposit be profitable at the time the validity of the claim is challenged.

Further, petitioner takes issue with the conclusion of the Board (affirming the finding of the Administrative Law Judge) that based on the evidence of record produced at the hearings, the contestee failed to establish that the cinders from the claims could be extracted, removed, and marketed at a profit in 1955. Aiken argues that the testimony of Denzel Aiken, a principal of contestee, and Sylvia Bell, one of the original locators of the claim in 1954 and 1955, was not germane in this regard. Petitioner contends that neither the fact that additional capital investment was required to make the claims productive nor the absence of any appreciable production prior to 1955 was material to the issue, citing United States v. Harenburg, 9 IBLA 77 (1973).

Finally, petitioner argues that even if there was insufficient evidence of the marketability of the cinders from the claims after the contest hearing, the Board erred in finding the claims invalid rather than remanding the case for a further hearing. Aiken cites United States v. Hooker, 48 IBLA 22 (1980), for the principle that a mining claimant does not run the risk of nonpersuasion on an issue with respect to which no evidence has been presented. Petitioner asserts that no evidence was presented by BLM regarding the economics of cinder production from the claims.

Subsequent to receipt of the request for reconsideration in this case, counsel for BLM filed a request with the Board to vacate its decision in this case and remand the case to BLM for further consideration of the patent application. BLM contends that, in response to Aiken's petition, a review of the mineral report in this case was undertaken by BLM management which led to a finding that the report which was the basis of the decision to contest the claims did not meet BLM standards. It is further asserted that the report was not reviewed by other BLM officials in accordance with normal procedures prior to filing the contest. As grounds for the remand request, BLM contends that the contest of the claims should not have issued, noting that "identical cinder claims" in Nevada were patented to contestee's competitor, Cind-R-Lite, on the basis that a market for cinders existed in Las Vegas in 1955. Although acknowledging that the Board's decision did not rely on the mineral report as a basis for finding that appellant failed to show by a preponderance of the evidence that cinders from Aiken's claims

could be extracted, removed, and marketed at a profit in 1955, BLM asserts the report is so flawed as to adversely affect the contestee's ability to respond and, further, asserts that the record in this case is inconclusive on the issue of marketability.

[1] In asserting error in the decision in this case, petitioner places a great deal of emphasis on the existence of the Las Vegas market for cinders. We note that the existence of this market was acknowledged by both the Administrative Law Judge and the Board:

> Appellant states that there was a "booming outlet for [the] profitable disposal of a substantial quantity of cinders prior to July 23, 1955, in the Las Vegas market." (Brief at 9). The production of cinder in the "Cima area" of California and sales to buyers in Las Vegas had been overlooked by the Government mineral examiner, and, based on appellant's evidence, Judge Clarke concluded that "[o]n July 23, 1955, there was, ostensibly, a market for cinders." (Decision at 11). We agree. Indeed, there was testimony by Russell Aiken that ABP [Aiken Builders Products] alone was using 80,000 pounds of cinder per day in its manufacturing operations between 1955 and 1957. (Tr. I at 428). Moreover, a substantial market had been in existence since at least 1947. (Tr. I at 74, 329-31; see also Tr. I at 105-09, 119-20). The existence of a market is not negated by the fact that ABP was at such times purchasing, for the most part, from Emerson Ray's "Cima pit" operations (Tr. I at 339; Exh. 4 at 26), in the absence of evidence that the market was closed to competition. United States v. Gibbs, [13 IBLA 382, 392-93 (1973)]. However, as Judge Clarke further stated, "the bare existence of a market is not sufficient to satisfy the marketability test" (Decision at 11).

95 IBLA at 59 (emphasis in original). Thus, the Board went on to consider the evidence on the question of whether the cinder deposit on Aiken's claims could be extracted, removed, and marketed at a profit prior to July 23, 1955.

Petitioner's contention that newly discovered evidence regarding the existence of a market for cinders in 1955 rebuts the Government's prima facie case of the invalidity of the claims does not reflect a careful analysis of our decision in this case. Rudys' opinion was not based solely on his research of published reports regarding the extent of the market in 1955, but also on his interviews with Vera Love, a predecessor in interest of the contestee; Denzel Aiken, a principal of the contestee; and Warren Mecham, mine supervisor for the contestee. 95 IBLA at 57. Broad-based data regarding the existence of a market for cinders is not effective to rebut an opinion regarding marketability of cinders from the claims at issue derived from discussions with those intimately involved in the claims and their development.

Aiken contends that having shown the existence of a market for cinders in 1955, i.e., the Las Vegas market, it has rebutted the Government's prima facie case and is not required to make any further showing, citing United States v. Pool, 78 IBLA 215 (1984). However, this analysis will not withstand scrutiny. The prima facie case goes to the question of marketability--whether the cinders from the claims can be extracted, removed, and marketed at a profit--and not simply to the existence of a market. The precedent of United States v. Pool, supra, is simply not germane in this context. Under these circumstances, we must reaffirm our conclusion that a prima facie case was established.

Contrary to petitioner's assertion, we find sound authority, as noted in our decision, 95 IBLA at 59, for the principle that in determining the validity of a location for a common variety mineral made prior to July 23, 1955, where evidence is lacking of pre-1955 sales, the costs of extraction, preparation, and transportation, as well as the level of the then-existent market, should be considered. Rawls v. United States, 566 F.2d 1373, 1376 (9th Cir. 1978); United States v. Gibbs, supra at 391. We carefully reviewed and analyzed the record in this case regarding the sale of cinders from these claims prior to 1955 in our decision and concluded: "Based on the record, it is clear that although some isolated sales of cinders were made prior to July 23, 1955, no income was realized by the claim holders and no commercially viable marketing of the cinders from the claims had been accomplished." 95 IBLA at 58.

It is clear from the record, including the testimony of Hale Tognoni, Aiken's expert, that the cinders from the claims could not have been marketed at a profit in the Las Vegas market without installation of substantial improvements on the claims including roads and screening/sorting equipment. 95 IBLA at 59-60. Upon analysis of the record, the Board found that the evidence failed to establish that "the market for cinders in 1955 was sufficient to justify the capital investment required to market the cinders" from these claims. 95 IBLA at 60. We noted that Denzel Aiken was approached by the Bells prior to 1955 with an offer to sell the mine which he declined despite his own need for cinders in his cinderblock manufacturing operation. Petitioner discounts the relevance of this testimony in light of his statement that he "didn't think [he] should get into the mining business" (Tr. I at 358), asserting that the proper standard is an objective test. Petitioner asserts that a prudent miner would have made the investment. However, we find this does not make his testimony any less probative on the question of whether a prudent miner would invest in development of the claims, i.e., whether the cinders could be mined, removed, and marketed at a profit as of July 23, 1955. Denzel Aiken's firm represented one of the principal components of the potential Las Vegas market for these cinders and his supply from Cind-R-Lite had been previously cut off, yet he turned down an offer to acquire these claims prior to 1955. We note that his opinion regarding the desirability of investing in the claims obviously changed sometime after 1955.

Further, contrary to petitioner's contention, we cannot discount the testimony of Sylvia Bell, who tried to develop the claims but was unable

to develop them prior to 1955. We reject Aiken's contention her testimony is to be ignored because she somehow lacked the entrepreneurial skills or financial know-how to develop the claims. The evidence simply does not support a conclusion that a reasonably prudent miner would have been justified as of July 23, 1955, in making the investment in capital improvements necessary to extract and market the cinders from these claims. While we recognize that neither the lack of development prior to 1955 nor the need for investment in capital improvements is a bar to validity, we find this evidence distinguishes this case from United States v. Harenburg, supra, cited by petitioner.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we reaffirm our decision in United States v. Aiken Builders Products, 95 IBLA 55 (1986), on reconsideration. Accordingly, since no basis to alter the decision reached in this case has been shown, the motion to vacate the decision and remand the case is hereby denied.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

At the outset, I wish to underline the fact that I am in total agreement with the majority as to the disposition of the instant petition for reconsideration. As the majority clearly shows, the petition is premised primarily in an admixture of a misconception of the basis for this Board's as well as Administrative Law Judge Clarke's decision together with an attempt to relitigate issues which this Board fully considered in its original disposition. I write separately because I wish to address certain arguments advanced in favor of the petition which, to my mind, evince a fundamental misapprehension on the part of both appellant and the Bureau of Land Management (BLM) as to the nature of contest proceedings relating to determinations of the validity of mining claims.

Initially, it is important to keep in focus the fact that this petition arises after appellant's assertion of a discovery of a valuable mineral deposit had been rejected both by the Administrative Law Judge and a unanimous panel of this Board. A review of the proceedings below, as well as those before this Board, discloses that appellant was ably represented by counsel who sought to establish that the five pumice claims in question were supported by a discovery as of the critical date, i.e., July 23, 1955, when Congress removed common varieties of certain widely occurring minerals, including, inter alia, pumice, from location under the mining laws of the United States. Upon rendition of the Board's decision, reported as United States v. Aiken Builders Products, 95 IBLA 55 (1986), appellant had exhausted its administrative remedies (see 43 CFR 4.21(b)), and could, assuming that it was dissatisfied with the result, seek review of that determination in the appropriate United States District Court.

It is, of course, axiomatic that no judicial or quasijudicial body, regardless of the care which it takes in its deliberations, is immune from error. And, it is equally true, that it is better for all concerned that, should an error be made, it be corrected at the earliest possible point so as to minimize adverse effects upon the parties to the proceeding. At the same time, all adjudicatory bodies recognize that an end must come to any litigation, that a point is reached where the constant relitigation of the same issues results only in delay in the ultimate resolution of conflicting claims with no discernible benefit to any participant. It is with both of these divergent considerations in mind that the Department crafted its regulation governing petitions for reconsideration. 1/ Thus, 43 CFR 4.21(c) provides:

1/ Subsequent to our decision in the instant case, the Board amended its regulations to specifically provide that a petition for reconsideration must be filed within 60 days after the issuance of a decision. See 43 CFR 4.403, 52 FR 21308 (June 5, 1987). In all other respects, however, the new regulation specifically applicable to IBLA tracks with the general regulation set forth at 43 CFR 4.21(c).

> No further appeal will lie in the Department from a decision of the Director or an Appeals Board of the Office of Hearings and Appeals. Unless otherwise provided by regulation, reconsideration may be granted only in extraordinary circumstances where, in the judgment of the Director or an Appeals Board, sufficient reason appears therefor. Requests for reconsideration must be filed promptly, or within the time required by the regulations relating to the particular type of proceeding concerned and must state with particularity the error claimed. The filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision involved unless so ordered by the Director or an Appeals Board. A request for reconsideration need not be filed to exhaust administrative remedies. [Emphasis supplied.]

Under this regulation, the existence of extraordinary circumstances is the initial prerequisite to the granting of any petition for reconsideration. What, then, are the extraordinary circumstances on which appellant predicates its petition. 2/ Succinctly stated, appellant asserts that there were mistakes of fact and errors of law in our prior decision. In support of the assertion of factual error, appellant argues that new data, only recently obtained, undermined the expert opinion of the Government mineral examiner, Joseph F. Rudys, that the market for pumice was "bad," in 1955. Thus, appellant states:

> However, the bases upon which Mr. Rudys formed his opinion that, in about 1955, "the market was bad"--that is, the 1955 Minerals Yearbook published by the United States Department of the Interior Bureau of Mines, and other similar documents--have been refuted by more complete documents discovered by the Office of the Solicitor of the Department of the Interior. These Bureau of Mines documents--which were discovered following Aiken Builders Products' November 8, 1985 memorandum to Assistant Secretary Griles, and were thereafter provided to counsel for Aiken Builders Products by the Office of the Solicitor--are attached hereto as Appendix E. [Emphasis supplied.]

Memorandum to the Secretary at 4.

2/ Technically, of course, appellant did not file a petition for reconsideration of the Board's decision under 43 CFR 4.21(c). Rather, it petitioned the Secretary to exercise his supervisory authority under 43 CFR 4.5. The Secretary chose not to exercise his authority under 43 CFR 4.5, but rather referred the matter to the Director, Office of Hearings and Appeals (OHA), for his consideration. See Memorandum of Jan. 25, 1988, from Acting Assistant Secretary, Land and Minerals Management, to Director, OHA. The Director, OHA, in turn referred the matter to this Board for its consideration. Thus, the considerations normally attendant on the exercise of the Board's authority to grant a petition for reconsideration are properly applicable to the present case.

I will discuss below what I believe to be appellant's erroneous preoccupation with the existence of a prima facie case in this appeal. At the present time, however, I wish to focus on the relevancy of the documents which appellant asserts were only recently "discovered."

It is scarcely an unusual matter for parties who were unsuccessful at a hearing to assert, on appeal, that the reason for the adverse decision below was that the "facts" on which the decision was premised were not the true facts. Thus, the appellant will contend that, if the true facts were considered, a different result would obtain. Often, this argument is accompanied by factual assertions, in the nature of assay results and the like, which the appellant wishes the Board to consider in making its decision.

An initial obstacle which such an appellant must hurdle, however, is the regulatory proscription found in 43 CFR 4.24(a)(2) and (3), requiring that the record made at a hearing must be the sole basis for the decision except to the extent that official notice may be taken of a fact, pursuant to 43 CFR 4.24(b). Accordingly, it has been the consistent rule in the Department that evidence may only be submitted on appeal for the limited purpose of ascertaining whether a new hearing should be ordered. See United States v. Mattox, 36 IBLA 171 (1978); United States v. Kottinger, 14 IBLA 10 (1973); United States v. Winters, 78 I.D. 193 (1971); United States v. Lutey, 76 I.D. 37 (1969); United States v. Benson, A-31061 (Sept. 4, 1969); United States v. Wedertz, 71 I.D. 368 (1964); UnitedStates v. Capt, A-27749 (Dec. 17, 1958). Moreover, since the entire purpose of granting fact-finding hearings in the first instance is to develop an evidentiary record, a party submitting evidence after a hearing must not only show a compelling reason to use evidence which was not tendered at the hearing (see United States v. Reynders, 26 IBLA 131 (1976)), it must also justify its failure to submit the evidence at the first hearing when it was afforded the opportunity to do so. See United States v. Holder, 100 IBLA 146, 148-49, (1987); United States v. Whitney, 51 IBLA 73, 88 (1980); United States v. Synbad, 42 IBLA 313, 322 (1979); United States v. Hanson, 26 IBLA 300 (1976).

Appellant apparently attempts to meet this last requirement by asserting that "new data, previously unavailable, and only recently obtained by the Office of the Solicitor of the Department of the Interior and provided to counsel for claimants here, reveals that the testimony of the Bureau of Land Management witness that there was no market for cinders in 1955 is incorrect" (Memorandum to Secretary at 8). What exactly is this "new data, previously unavailable" upon which appellant premises its case? It is the initial edition of a book, published by the Bureau of Mines commencing in 1956 and thereafter in intervals of every 5 or so years, entitled Mineral Facts and Problems, together with the 1954, 1955, and 1956 editions of the Mineral Yearbook. Quite frankly, these are standard reference works readily available from numerous sources. 3/ The clear implication in appellant's

3/ In fact, when the Bureau of Mines published the Bicentennial Edition of Mineral Facts and Problems in 1976, the editors noted:

memorandum to the Secretary that these could only be found in internal Bureau of Mines' files and were "previously unavailable" is simply specious.

Even ignoring this deficiency, however, a review of the Board's decision shows that the entire thrust of appellant's argument on reconsideration is misdirected. Thus, appellant repeatedly seeks to undermine the Government's prima facie case. The problem is that not only did appellant proceed to put on its own case after the Government's presentation, appellant failed to even move for dismissal of the complaint after the Government's case-in-chief was presented. See I Tr. 47. Nor, indeed, did appellant argue this point before the Board when its appeal was on review. See generally, Appellant's Opening Brief. Thus, appellant has totally failed to preserve this objection and should not be heard to argue it as a basis for granting a petition for reconsideration.

Even had the objection been preserved, the principle is well-established that where a party, after denial of a motion to dismiss based on the asserted failure of the Government to present a prima facie case, nevertheless proceeds to present evidence, the determination of the validity of the claim must be made on the basis of the record as a whole, and not just a part of the record. See United States v. Anderson, 83 IBLA 170, 175-78 (1984); United States v. Pool, 78 IBLA 215, 220 (1984), and cases cited. Admittedly, the Board noted in Pool that, in the absence of a prima facie case, a mining claimant does not bear the burden of preponderation on any issue as that burden only arises as to those issues for which a prima facie case has been established. But, we expressly cautioned that the claimant does run the risk "that the evidence as a whole will prove that an element of discovery is not present." Id. (emphasis in original). The decision of the Board was clearly premised on all of the evidence presented and not merely on the testimony of Rudys.

Another critical error in appellant's present approach is the assumption that evidence submitted after the completion of the Government's case-in-chief can be used to vitiate the existence of a prima facie case. This is not correct. The existence of a Government prima facie case is determined solely by reference to the evidence adduced during the presentation of the Government's case-in-chief.

As has been pointed out in innumerable decisions, a prima facie case means simply that "the case is completely adequate to support the

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fn. 3 (continued)

"This Bicentennial volume is the fifth edition of Mineral Facts and Problems, which, during the past 25 years, has become a standard reference work on mineral commodities in the United States and abroad. It functions as a perspective supplement to the numerous current and annual reports and publications generated and distributed through the Bureau of Mines data gathering, analysis, and information system illustrated on the following page."
Mineral Facts and Problems (1976) at III.

Government's contest of the claim and that no further proof is needed to nullify the claim." United States v. Bunkowski, 5 IBLA 102, 119, 79 I.D. 43, 51 (1982). Thus, a prima facie case exists if the evidence would be sufficient, by itself, to justify a finding that the claim is null and void. Once the Government has presented a prima facie case, the burden then shifts to the mining claimant to overcome this showing by a prepoderance of the evidence. We noted in United States v. Copple, 81 IBLA 109, 120 (1984), a case involving an admission of invalidity as to certain claims by a mining claimant's representative, that "where the Government mineral examiner testifies that a mineral claimant or his representative has stated that certain claims are not supported by a discovery, such testimony, unless impeached in cross-examination, is sufficient to constitute a prima facie case that those claims are invalid." (Emphasis supplied.) We recognized in Copple that the direct testimony of a Government mineral examiner was not preclusive of subsequent attempts by a claimant to contradict the substance of the admission, but, unless the claimant was successful in impeaching the witness in cross-examination, such actions would necessarily arise after the burden of preponderation had shifted to the mining claimant.

Therefore, to the extent that appellant is attempting to introduce evidence to undermine Rudys' testimony, regardless of how probative it may be to the ultimate question of discovery, such evidence could simply not be used in determining whether or not a prima facie case had been established, since consideration of that question is necessarily limited to the record made at the hearing during the Government's case-in-chief. Subsequent testimony or evidence may overcome this showing, but once BLM has presented a prima facie case, the burden of preponderation irrevocably shifts to the claimant, however ill-based the Government's evidence might ultimately be shown to be.

Moreover, even if we consider the "newly discovered" evidence,
ignoring the myriad deficiencies set forth above, it is clear that these publications are, in light of the decision actually rendered both by Judge Clarke and this Board, totally beside the point. Throughout its memorandum to the Secretary, appellant consistently reiterates its assertion that Judge Clarke and this Board found that no market existed for pumice in Las Vegas or Los Angeles. As the majority takes great pains to point out herein, that is quite simply a profound misreading both of our decision and the decision of Judge Clarke. Just how dramatically askew this is, is made abundantly clear by a review of the colloquy between Judge Clarke and counsel at the close of the final day's testimony. Thus, the following discussion transpired:

> MR. LEMANN: Your Honor, is there any question in the Court's mind as to the market for cinders during this period?
>
> MR. MC HENRY: Objection. He is asking for a legal conclusion which we hope you have not made.
>
> JUDGE CLARKE: Well, in a conference with counsel off the record at the other hearing I said that I had some question about whether the market was being totally supplied.

> That, of course, is one of the legal issues that has to be addressed by me during this period. Now, we do know more now than we did before.
>
> We clearly know that there were cinders removed. And even though the Claimant did not get paid for them, there were cinders removed and apparently marketed during this critical period.
>
> I am not prepared to give you an answer on it, but it certainly is a matter I am going to study. [Emphasis supplied.]

(II Tr. 73). Counsel for appellant then stated that, if the Judge still had doubts about the existence of a market, he could put on two additional witnesses. Judge Clarke replied:

> As far as I am concerned, Mr. Lemann, the evidence today shows me that there were cinders removed during the critical years for landscaping purposes.
>
> The fact that some other small operator actually took some off I do not think is going to affect my judgment concerning it that much.

(II Tr. 75).

Nothing in either the decision of Judge Clarke or of this Board ever remotely suggested that there was no market for pumice in either Las Vegas or Los Angeles. Rather, what this Board quite clearly held was that appellant had failed to show by a preponderance of the evidence that there was a market for the cinders from the five claims at issue at the time that common varieties were withdrawn from mineral location. To say it another way, appellant failed to establish that a prudent man would have been justified in the further expenditure of his labors and means with a reasonable prospect of success in developing a paying mine from the subject claims as of July 23, 1955, since appellant could not show that pumice from the claims was then presently marketable at a profit, as that term is correctly defined. See In Re Pacific Coast Molybdenum, 75 IBLA 16, 29-30, 90 I.D. 352, 360 (1983).

To the extent, therefore, that appellant seeks to introduce new testimony probative of the existence of a market in Las Vegas for pumice as of the critical date, appellant is attempting to litigate a point that is simply not in issue. The question still remains, however, whether the pumice from appellant's claims were supported by a discovery. And it is on this issue that both Judge Clarke and this Board found the testimony of Sylvia Bell and Jack DelFante so critical. It was this testimony and not that of Rudys which served as the catalyst for the adverse decisions rendered in this case.

This brings me to the second major issue which I wish to discuss. The majority briefly adverts to the fact that counsel for BLM management 4/ has filed a motion asking that the Board set aside its decision and remand the matter to the State Office for further review of the patent application. In all candor, I find it difficult to fathom the theoretical basis upon which this motion proceeds.

Briefly, counsel for BLM management argues that, after receipt of appellant's memorandum, it "was sufficiently concerned by the inadequacies identified by appellant that it directed a review of the 1981 mineral report * * * by an experienced mineral examiner from a different State Office" (Motion for Remand at 2). This report found numerous deficiencies, including, inter alia, failure to have the report properly reviewed. Counsel further stated that, under established BLM procedures, a contest complaint should not have been issued without a technically reviewed mineral report as its basis. 5/ Id. Counsel concluded:

> BLM recognizes that the Board based its decision on the lack of marketability evidence from the claimant and not on the evidence presented by BLM. (95 IBLA at 60). Indeed, the California State Director argued that the Board's decision should stand for this very reason. However, BLM finds that the 1981 report which formed the basis for the contest to be so flawed that it had to adversely affect the claimant's ability to respond. No mining claim should be declared invalid for the lack of marketability when BLM cannot even identify the relevant market. As a result of its review of the matter, BLM finds the record to be inconclusive on the question of marketability. [Emphasis supplied.]

Id. at 3.

4/ I use the term "BLM management" in this discussion, since counsel for BLM employed this term. It is apparent that counsel used this term to differentiate between the BLM Directorate and the BLM California State Office, since the latter body clearly opposed the motion being filed by counsel. See Memorandum from the California State Director, BLM, to the Director, BLM, dated Nov. 4, 1987.

5/ The assertion that the Rudys mineral report was not properly reviewed is not borne out by the record before this Board. During the period in question, the BLM Manual provided that the "Chief, Branch of Minerals makes a technical review of all mineral reports prepared in the State." BLM Manual 3980.04C (Rel. 3-l7, dated Dec. 30, l970, superseded by Rel. 3-99, dated Oct. l6, l984). In point of fact, the patent application file contains a memorandum, dated Mar. 3l, l98l, from the Chief, Branch of Lands and Mineral Operations, to the California Desert District Manager, entitled "Technical Review [of] Mineral Report M.A. CA 6490." The memorandum clearly constitutes the technical review required by the Manual provisions. A review of the report prepared by the Utah State geologist indicates that he did not review the patent application file. Thus, he was unaware of the fact that the Chief, Branch of Land and Minerals, had made a technical review of the mineral report prior to the issuance of the contest complaint.

To my mind, this request for remand filed on behalf of BLM management could only be premised on a misunderstanding of the role and relevancy of a Government mineral examiner's report and a misapprehension as to the nature of the facts that are actually of record in the instant case.

A Government mineral report may find its genesis in any number of situations. It can be prepared in response to a request from a surface management agency other than the Bureau. It may be commissioned by BLM itself when questions arise whether mining activities on BLM-managed land are authorized under the law. Or, it may become necessary where, as here, a mining claimant makes application to patent land and BLM seeks to fulfill its statutory mandate to examine claims to the land of the United States "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." United States v. Cameron, 252 U.S. 450, 460 (1920).

But, regardless of the impetus for its preparation, a mineral report, just like any other internal BLM report, has no independent evidentiary weight nor is it probative as to any issue of law or fact, "until such time as the pertinent facts are admitted by the applicant or the report is admitted as evidence at a hearing initiated by a contest complaint." John B. Coghill, 29 IBLA 177, 181 (1977); Don E. Jonz, 5 IBLA 204, 207 (1972). The sole impact of the report is to inform the authorized officer as to mineral values so that he might decide, in the exercise of his delegated authority, whether or not a contest complaint should issue. Once that decision has been made, unless the report is subsequently admitted into evidence, it has no relevancy whatsoever to the contest proceedings, and, indeed, is not even part of the record upon which the determination of the claim's validity will be made.

This Board has reviewed a veritable plethora of appeals, too numerous to count, in which the parties have challenged the contest complaint on the ground that it was issued only as the result of personal animus directed toward the claimants. In every case, the Board has consistently rejected such challenges, not because the Board was convinced that such hostility was never a factor in the initiation of a complaint, but rather on the simple realization that the reason why a complaint has been issued is ultimately irrelevant to the question being examined, namely, has the claimant made a discovery of a valuable mineral deposit within the meaning of the mining laws. See, e.g., United States v. Franklin, 99 IBLA l20, l26 (l987); United States v. Gay, 36 IBLA 148 (1978); United States v. Morton, 32 IBLA 263 (1977).

A contest complaint properly issues whenever the authorized officer has reason to believe that a mining claim may not be supported by a discovery. In essence, a hearing gives the claimant an opportunity to show, to an impartial fact-finder, that it possesses what it has asserted by the location of the claim, viz., a right good against even the Government. Where, as here, the claimant seeks to divest the Government of legal title to the land, the obligation that the Government take special care that only meritorious claims are granted is magnified. Seen in this context, a requirement that a mineral claimant establish, at a hearing, that it is entitled

to patent is not an onerous task. Cf. Eugene Witt, 90 IBLA 330, 335-36 n.4 (1986). And, even if it were so viewed, it is a burden which a claimant has chosen to shoulder by electing to seek a patent.

Moreover, if, in fact, a Government contest was animated by malice, or if, as it is here alleged, the mineral report which has served as a basis for the complaint is lacking in substance, then the hearing will serve as a refiner's fire where the true gold may be separated from the dross. But it is passing strange to argue that where a contest has been completed, spanning almost 3 entire days, and the record has been reviewed by an Administrative Law Judge and, on appeal, a panel of this Board, all of whom are unanimous in their conclusion that the claims are properly declared null and void, the entire process should be nullified because it is now contended that the mineral report prepared to determine whether a contest complaint should be issued was, itself, defective.

The foregoing has even greater relevance where, as in the instant case, the mineral report was never introduced into evidence. There may well be lacunae and shortcomings throughout the report which Rudys prepared. Be that as it may, it is a self-evident fact that neither this Board, nor Judge Clarke, nor counsel at the hearing could have been misled by the report since it is not part of the record on which the decision was made.

I well understand the desire of BLM to assure that its mineral examiners faithfully follow instructions and prepare mineral reports that are a credit both to their personal reputations and that of the Bureau. I fail to grasp, however, how due consideration for this laudable goal supports, much less requires, the total voiding of a hearing which was necessarily untainted by the document in question. Moreover, if, indeed, the evidence presented was so poorly prepared and so lacking in an evidentiary foundation, one is left to wonder why appellant failed to overcome it either at the hearing, on original Board review, or within the confines of the present reconsideration. 6/ The majority convincingly establishes that, whatever deficiencies may have been present in the mineral examiner's analysis,

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6/ A close reading of one of the documents submitted in the memorandum to the Secretary, obviously with the purpose of casting doubt on the correctness of our previous decision reached herein, actually substantially undermines a key element of appellant's case. Thus, Denzel Aiken, a principal in appellant since 1947, had testified that until 1953 appellant had purchased cinders for its block plant from Cind-R-Lite's facilities in Nevada. When asked by counsel why he ceased purchasing his cinders from Cind-R-Lite, Aiken explained:

"A. Cinderlite changed hands. And a construction contractor by the name of Conally located or living in San Francisco bought the Cinderlite Company.

"Q. And was there a change of management at Cinderlite?

"A. Yes.

"Q. What were the specific reasons, other than the change in ownership that you stopped buying from Cinderlite?

the entire record, viewed in its totality, supports the conclusion of both the Administrative Law Judge and this Board that the claims were properly declared null and void.

Accordingly, I fully concur in the denial of the petition for reconsideration filed by appellant and the request for remand filed on behalf of BLM management.

James L. Burski
Administrative Judge

fn. 6 (continued)

"A. Well, it was at their request. They didn't think it was advisable for them to sell cinders to the competitor and lose the advantage they had."
(I Tr. 336).

This testimony was important because it showed that appellant was actively searching for a usable deposit of pumice during the critical years just immediately preceding the removal of common varieties of pumice from mineral location. However, appellant has now submitted a copy of the mineral report prepared in response to a patent application by Cind-R-Lite. See App. G to Memorandum to Secretary. Therein, at page 3, it is disclosed that T. E. Connolly, Inc., a Delaware corporation, purchased the subject Cind-R-Lite claims on Apr. 28, 1955. This latter date would, necessarily, greatly weaken appellant's assertion that it had been actively hunting new pumice deposits in the years immediately prior to 1955.

MEMORANDUM DECISION OF THE SECRETARY OF THE INTERIOR

TO: Director, Office of Hearings and Appeals; and
Director, Bureau of Land Management

THROUGH: Assistant Secretary, Land and Mineral Management
Solicitor

SUBJECT: Appeal of Decisions of Interior Board of Land Appeals in Appeal of Aiken Builders Products, IBLA 85-99 (decided December 19, 1986) and Appeal of Aiken Builders Products (On Reconsideration), IBLA 85-99 (decided April 14, 1988)

On April 25, 1988, Aiken Builders Products, through counsel, and in accordance with 43 CFR Section 4.5, requested that Secretary Hodel assume jurisdiction of the matter of Appeal of Aiken Builders Products, IBLA 85-99.

On September 16, 1988, in accordance with 43 CFR Section 4.5(c), Secretary Hodel assumed jurisdiction of the case of Aiken Builders Products and requested the administrative record. Subsequently the record was received. Thereafter I participated with Secretary Hodel in numerous oral briefings regarding this appeal. On January 30, 1989, I received a final, detailed oral briefing regarding this appeal. In addition, I reviewed those documents which I consider germane to this appeal.

For reasons appearing in the administrative record and based upon the aforementioned briefings and discussions, I agree with the written position of the Director of the Bureau of Land Management and the Solicitor earlier field with the Interior Board of Land Appeals that the decision of the Interior Board of Land Appeals should not stand. Thus, the decisions of the Interior Board of Land Appeals in Appeal of Aiken Builders Products, (On Reconsideration), IBLA 85-99 (Decided April 14, 1988), and the decision of the Administrative Law Judge in Contest No. Ca-6490, are hereby vacated.

I consider further delay in this matter to be inappropriate, since it would constitute an unjustified burden upon all the parties in this appeal. Any additional delay would result in the new Secretary having to familiarize himself with this matter and would obviously entail a delay of some months. I believe

justice is best served by the expeditious and equitable resolution of this matter.

Aiken Builders Products is hereafter permitted to submit a mineral patent application for the Valco Nos. 1 and 2, and Red Beauty Nos. 1, 2, and 3, all mining claims situated in San Bernardo County, California. Upon receipt of any application by Aiken Builders Products for mineral patent, the Bureau of Land Management shall conduct a de novo assessment of the validity of the Valco Nos. 1 and 2, and Red Beauty Nos. 1, 2, and 3 mining claims in order to determine whether the subject lands should be patented to Aiken Builders Products under any mineral patent application filed by Aiken Builders Products. The assessment conducted by the Bureau of Land Management shall be in accordance with applicable statutes, rules, and regulations, and shall take into consideration patent number 27-83-0002 issued to Hollie O. Allen (Cind-R-Lite) for the Lost, Found, Red Bird, and Red Cone Extension placer mining claims located in Nye County, Nevada

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Earl Gjelde, Under Secretary and
Acting Secretary of the Interior